

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROSA CARVAJAL	:	DETERMINATION
	:	DTA NO. 815317
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1992	:	
through May 31, 1994.	:	

Petitioner, Rosa Carvajal, 486 Montauk Avenue, Brooklyn, New York 11208-4825, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1992 through May 31, 1994.

Pursuant to section 3000.9(b)(1) of the Tax Appeals Tribunal Rules of Practice and Procedure, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the ground that petitioner failed to file either a request for conference or a petition within 90 days of the mailing of a notice of determination of sales and use taxes due. Petitioner's time to respond to the motion expired on January 13, 1997, which date began the 90-day period for issuance of this determination. Petitioner appeared on the petition by Manuel Vidal. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel). Based on the pleadings and motion papers, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a request for a conciliation conference or a petition for a hearing within the statutorily prescribed period.

FINDINGS OF FACT

1. Petitioner, Rosa Carvajal, filed a petition which was received by the Division of Tax Appeals on September 3, 1996. The petition references assessment number L 011571982.

Attached to the petition is a warrant filed against petitioner by the Commissioner of Taxation and Finance on August 7, 1996. The warrant references three different assessments including the one assessment listed on the petition. Also attached to the petition is a Conciliation Order Dismissing Request issued by the Bureau of Conciliation and Mediation Services ("BCMS") of the Division of Taxation ("Division") on August 23, 1996 and referencing assessment number L 011571982 (CMS No. 155946). The order states that a statutory notice was issued to petitioner on January 2, 1996 and that petitioner's request for a conciliation conference was not received until June 13, 1996. Because the request for a conference was not made within 90 days of the issuance of the statutory notice, the Division denied petitioner's request for a conference.

2. In its motion, the Division asserts that as a consequence of petitioner's failure to request a conciliation conference or petition for a hearing within 90 days of the mailing to her of a Notice of Determination, petitioner is not entitled to a hearing on the merits of her petition.

3. To establish the fact and date of mailing of the notice of determination, the Division submitted an affidavit from Geraldine Mahon, Principal Clerk of the Division's CARTS Control Unit (CARTS is an acronym for Case and Resource Tracking System and refers to the Division's computer system for generating statutory notices, among other things); an affidavit from James Baisley, the Division's Chief Mail Processing Clerk since 1994; a certified record of mailing and a copy of the notice in question.

4. Ms. Mahon states that she supervises the processing of notices of deficiency and notices of determination before they are shipped to the Division's Mechanical Section for mailing. Ms. Mahon receives a computer printout, entitled Assessments Receivable, Certified Record for Non-Presort Mail, which the Division refers to as its "certified mail record" ("CMR"). The statutory notices listed on the CMR and generated by CARTS are also forwarded to Ms. Mahon's unit. When it is received by Ms. Mahon, the CMR bears the date on which it was printed at the top left hand corner of each page. Each notice to be mailed is assigned a certified mail control number which is printed on the face of the notice. That same

number is listed under a column of the CMR headed "CERTIFIED NO". Each notice to be mailed is identified by an assessment identification number. This number appears on the statutory notice and is listed in the second column of the CMR under the heading "NOTICE NUMBER". The certified control number and notice number on the CMR are followed by the name of the addressee and the address to which the notice is being mailed.

5. The Division submitted a photocopy of the CMR on which the Notice of Determination issued to petitioner is listed. The CMR was printed with the date December 21, 1995 in the upper left hand corner of each page. On the first page, that date was crossed out, and the date January 2, 1996 was handwritten in its place. Ms. Mahon states that the CMR is ordinarily printed approximately 10 days in advance of the anticipated date of mailing of the notices. The handwritten change in the date is made by Division personnel to conform to the actual date that the CMR and the notices are delivered to the possession of the United States Postal Service.

6. According to Ms. Mahon, whose unit maintains possession of the original copy of the CMR, the CMR listing the notices mailed to petitioner consists of 21 fan-folded pages. Ms. Mahon asserts that all pages of a CMR are connected when the document is delivered to the possession of the United States Postal Service. The pages remain connected when the document is returned to Ms. Mahon's office after mailing of the notices, and they stay connected unless she requests that the pages be separated.

7. A copy of the CMR listing the notice mailed to petitioner was placed in evidence. The certified mail control numbers on this CMR run consecutively from P 911 204 339 to P 911 204 568. The pages are numbered consecutively from 1 to 21. Each page of the 21-page document bears a United States Postal Service date stamp of January 2, 1996.

8. Page nine of the CMR lists an item of certified mail addressed to Carvajal-Rosa, 486 Montauk Ave, Brooklyn, NY 11208-4825. The certified mail control number assigned to this item is shown as P 911 204 428. The item is identified on the CMR as notice number L 001571982.

9. The Division placed in evidence a copy of the Notice of Determination issued to petitioner. On the face of the notice, there is a certified mail control number and an assessment identification number, each of which corresponds to the associated number listed on the CMR.

10. In the regular course of business and as a common office practice, the Division does not request or retain certified mail return receipts.

11. In a second affidavit, Mr. Baisley describes the Division's ordinary procedure for delivering outgoing mail to the United States Postal Service.

12. After receipt of the CMR and notices, a member of Mr. Baisley's staff counts the envelopes and verifies the names and certified mail numbers on the notices against the information contained on the CMR. Each envelope is weighed and sealed and the appropriate postage and fee is placed on each one.

13. Mr. Baisley states that a member of his staff delivers the CMR and the stamped envelopes to the Colonie Center Branch of the United States Postal Service where a postal employee affixes a postmark or his or her signature or both to the CMR indicating receipt by the Postal Service.

14. On the CMR entered in evidence, a United States Postal Service date stamp of January 2, 1996 appears on the bottom of the last page of the CMR. There are two printed statements at the bottom of the CMR, following the listing of items to be mailed. The first line states: "TOTAL PIECES AND AMOUNTS LISTED 230". The next line states: "TOTAL PIECES RECEIVED AT POST OFFICE". The number 230 was handwritten next to this statement. Initials appear under this number. In reference to these entries, Mr. Baisley states:

"Here, the postal employee affixed a Postmark to every page of the certified mail record, rewrote the total number of pieces, and initialed the certified mail record to indicate that this was the total number of pieces received at the Post Office."

15. Mr. Baisley states that his knowledge that the postal employee wrote in the total number of pieces to indicate receipt of 230 pieces of mail:

"is based on the fact that the Department's Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces received on the mail record."

16. After its delivery, the CMR is left in the custody of the United States Postal Service. It is normally picked up by a member of the Mail Processing Center staff on the day following delivery and returned to the originating office. The CMR is the Division's record of receipt by the United States Postal Service of pieces of certified mail.

17. Petitioner mailed a Request for a Conciliation Conference to the Division by United States Postal Service Express Mail. A copy of the Express Mail Service receipt shows that the request was delivered to the custody of the Postal Service on June 12, 1996 and received by the Division on June 13, 1996.

18. Petitioner did not reply to the Division's motion for summary determination.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted,

"if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party" (20 NYCRR 3000.9[b][1]).

Here, petitioner failed to respond to the Division's motion. Consequently, she is deemed to have conceded that no question of fact requiring a hearing exists and that the facts alleged in the Division's motion papers are true (see, Kuehne & Nagel v. Baiden, 36 NY2d 539, 544, 369 NYS2d 667, 671; Costello v. Standard Metals, 99 AD2d 227, 472 NYS2d 325; Whelan By Whelan v. GTE Sylvania, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, I find that no material and triable issue of fact is presented and that the Division is entitled to a determination in its favor.

B. A petition contesting a notice of determination of sales and use taxes due must be filed within 90 days after the giving of notice of such determination (Tax Law § 1138[a][1]). As an alternative, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also 90 days (see, Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals (Matter of Roland, Tax Appeals Tribunal, February 22, 1996).

When the Division raises the untimeliness of a request for a conciliation conference or a petition as an affirmative defense, it bears the burden of proving both the fact and date of mailing of the notice (Matter of Novar TV & Air Conditioning Sales & Serv., Tax Appeals Tribunal, May 23, 1991; Matter of Katz, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered to the custody of the United States Postal Service (Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992).

The Division is not required to produce employees who personally recall the mailing of each individual notice of determination. Rather, the act of mailing may be proven by evidence of the Division's standard mailing procedure, corroborated by direct testimony or documentary evidence of actual mailing (Matter of Katz, *supra*; Matter of Novar TV & Air Conditioning Sales & Serv., *supra*). A properly completed Postal Service Form 3877, reflecting Postal Service receipt of the items listed on the form, represents direct documentary evidence of the date and fact of mailing (Matter of Air Flex Custom Furniture, *supra*; *see also*, Coleman v. Commr., 94 TC 82; Wheat v. Commr., 63 TCM [CCH] 2955). The certified mail record used by the Division contains most of the significant elements of the Postal Service Form 3877 and serves the same purpose.

Here, the Division established a standard mailing procedure through the Mahon and Baisley affidavits. The CMR, Notice of Determination and the affidavits established that the standard procedure was followed in this case. The Division's primary piece of evidence is the certified mail record. It was completed in a manner that shows that the 230 pieces of mail listed on the CMR were delivered into the custody of the United States Postal Service on January 2, 1996. The Notice of Determination, assessment number L 011571982, addressed to petitioner, was one of those pieces of mail.

C. A notice of determination issued pursuant to Article 28 of the Tax Law must be mailed by registered or certified mail, and the mailing of such notice is presumptive evidence of receipt by the person to whom it is mailed. The 90-day period for challenging a notice of determination, as provided for in Tax Law § 1138(a)(1), is measured from the date of mailing of

the notice (Tax Law § 1147[a][1]). In this case, the Division established that a Notice of Determination was mailed to petitioner on January 2, 1996. Consequently, petitioner had 90 days to respond by filing either a request for a conciliation conference or a petition for a hearing. Counting from January 2, 1996, the 90th day fell on Saturday, March 1, 1996. Therefore, petitioner's request for conference would have been deemed timely if it had been mailed on March 3, 1996, the following Monday (Tax Law § 1147[a][3]). The evidence shows that the request for conference was not mailed until June 12, 1996. Petitioner has not contested that evidence or offered evidence of the filing of a petition prior to the expiration of the period of limitation. Accordingly, the determination of tax due was "finally and irrevocably" fixed (Tax Law § 1138[1]) well before the request for a conference was filed, and the Division of Tax Appeals has no jurisdiction to disturb that determination.

D. The motion of the Division of Taxation for summary determination in its favor is granted, and the petition of Rosa Carvajel is dismissed with prejudice.

DATED: Troy, New York
March 27, 1997

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE